IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS

MARQUIS DYER,

Plaintiff-Appellee,

SC No. 123590
COA No. 235114
LC No. 00-024036 NH

v.

EDWARD P. TRACHTMAN, D.O.,

Defendant-Appellant.

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL ORAL ARGUMENT REQUESTED

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QUESTION PRESENTED

I. IN MICHIGAN, DOES AN INDEPENDENT MEDICAL EXAMINER OWE A DUTY TO AVOID CAUSING AN INJURY TO THE EXAMINEE DURING THE COURSE OF THE EXAMINATION?

Trial Court answered:	"No"
Defendant-Appellant answered:	"No"
Plaintiff-Appellee answered:	"Yes"
Michigan Court of Appeals answered:	"Yes"

JURISDICTRIONAL STATEMENT

Plaintiff-Appellee agrees with the Jurisdictional Statement of the Defendant-Appellant.

STANDARD OF REVIEW

Plaintiff-Appellee agrees with the Standard of Review submitted by the Defendant-Appellant.

COUNTER STATEMENT OF FACTS AND PROCEEDINGS

The Defendant's Statement of Facts and Proceedings is basically correct. However, the Defendant has failed completely to provide some minimal discussion of the underlying facts that serve as the basis for the ordinary negligence claim. Indeed, the lack of any such discussion suggests that the Defendant is talking about a different case.

Plaintiff claimed in his original complaint that he sustained a specific and discrete injury while he was being subjected to an independent medical examination (IME) by Edward P. Trachtman, D.O.

The Plaintiff underwent surgery on his right shoulder on April 16, 1997. The surgeon, Dr. Gary Gilyard, repaired a tear in the superior labrum of the right shoulder socket. After the surgery, Dr. Gilyard placed restrictions on the movement on the arm and shoulder and, in particular, the Plaintiff was instructed to avoid lifting the arm above 45 degrees. **Appellee's Appendix 2b-4b.**

During the IME on May 15, 1997 the Plaintiff informed Dr. Trachtman about the recent surgery and the restriction on movement of the right shoulder and arm. The Plaintiff testified that during the IME, Dr. Trachtman, suddenly without warning, grabbed his right arm and elevated it to 90 degrees. The Plaintiff further testified that he heard a snap in his right shoulder and the elevation caused extreme pain. **Appellee's Appendix 11b-13b, 15b.**

Dr. Trachtman admitted that the rotation of the right arm and shoulder was not part of the examination. He testified that he routinely honored the restrictions placed on an examinee by his/her surgeon. **Appellee's Appendix 23b-28b**.

On May 22, 1997 the Plaintiff was examined by Dr. Gilyard. At that time, Dr. Gilyard discovered that the labrum was again torn and there was clicking in the shoulder. [1]Consequently, the surgery was redone on June 19, 1997. **Appellee's Appendix 7b-8b.**

The Complaint alleged professional negligence. However, the professional negligence claim was abandoned by the Plaintiff. Plaintiff filed a Motion for Leave of Court to Amend the Complaint in order to include a claim of ordinary negligence.

The trial court refused to grant leave to amend ruling that the proposed amendment was futile. The trial court held that the lack of a physician-patient relationship barred all of the claims.

The Court of Appeals reversed holding that an IME physician must perform the examination in such a manner so as not to injure the examinee.

ARGUMENT

I. MICHIGAN LAW RECOGNIZES THAT A PHYSICIAN, WHILE PERFORMING AN INDEPENDENT MEDICAL EXAMINATION, OWES A DUTY TO AVOID CAUSING AN INJURY TO THE EXAMINEE DURING THE COURSE OF THE EXAMINATION.

A. MANY JURISDICTIONS HAVE RECOGNIZED A CAUSE OF ACTION AGAINST AN IME PHYSICIAN BASED ON THE DUTY NOT TO INJURE AND THE WYOMING SUPREME COURT SPECIFICALLY EXCLUDED FROM ITS HOLDING THE PRECISE DECISION REACHED BY THE COURT OF APPEALS.

At the outset, the Defendant's reliance upon the Wyoming Supreme Court's recent ruling in **Erpelding v Lisek, 71 P3d 654 (Wyo.2003)** is terribly mistaken. Indeed, it appears that the Defendant has not carefully read the issues addressed by the Wyoming Supreme Court in **Erpelding**. On page 3 of the Opinion, the Court specifically indicated that it was addressing the following issue:

II. Whether [Lisek] owed a duty to [Erpelding] in performing an independent mental evaluation of [him], other than to avoid causing an injury to him during the course of the evaluation itself, where [Lisek] neither counseled nor treated [Erpelding], but only evaluated [him] at the request of his employer? (**Emphasis added**).

In sum, the Wyoming Supreme Court specifically excluded from its Opinion the precise issue addressed by the Court of Appeals.

The conclusion reached in **Erpelding** is not surprising. After all, the court in **Rogers v Horvath, 65 Mich App 644; 237 NW2d 595 (1975),** by analyzing the patient-physician relationship, came to the same conclusion over 25 years ago.

Other jurisdictions have examined the duty a physician owes an examinee during an IME. In **Greenberg v Perkins, 845 P2d 530 (Colo, 1993),** the court stated "a physician owes a duty to the person being examined to exercise professional skill so as not to cause harm to that person by negligently performing the examination." **Id. at 536.** In **Ramirez v Carreras, 10SW3d 757, 762 (Tex App 2000),** the court stated that there was a "duty not to injure." As noted by the Court of Appeals, at Fn 4, dicta in a number of other cases acknowledges the duty. **Hafner v Beck, 185 Ariz 389, 392; 916 P2d 1105 (Ariz App 1995); Rand v Miller 185 W Va. 705, 708; 408 SE2d 135, 655 (1991); Felton v Schaeffer 229 Cal App 3d 229, 235; 279 Cal Rptr 713 (1991). See, also Lotspeich v Chance Vought Aircraft, 369 SW2d 705, 707 (Tex Civ App, 1963).**

In the case at bar, the Court of Appeals at page 4 of the Opinion provided the following rationale for the rule:

> A physician conducting an IME does not enter into a physician-patient relationship with the examinee. Thus, the law does not impose any general duty to examine, diagnose or treat the examinee in a professional manner, at the risk of liability for malpractice. Nonetheless, the physician does voluntarily accept a much lesser duty to conduct the IME in a manner that will not affirmatively cause physical harm to the examinee during the examination. Accordingly, a physician can be liable if, because of the physician's negligence, the IME results in such harm to the examinee. **Id. at 4.**

Clearly, the duty is very limited. It will apply in a few rare cases in which an examinee is injured during the examination. Also, as noted by the Court of Appeals, at page 4, a claimed injury alone is not sufficient because the Plaintiff still bears the burden of proving negligence and proximate cause.

This represents a small bump in the road for physicians that perform IMEs. It will have no impact on practicing physicians and the cost of their medical malpractice insurance.

The alternative is that an examinee, injured during the course of an IME, is left without a remedy. Absent a negligent act, there is simply no reason for an examinee to be injured during an IME. If an injury occurs, then a civil lawsuit should be allowed. An injury, such as the injury in the case at bar, is no different than allowing a patient to claim ordinary negligence for a fall. **See e,g, Fogel v Sinai Hospital, 2 Mich App 99; 138 NW2d 503 (1965).**

An IME physician does not need any more legal protection. If diagnosis, opinion, conclusion or professional judgment is involved, then, in that event, the IME physician is fully protected because of the lack of a patient-physician relationship. **Rogers, supra; Cox v Board of Hosp. Managers for City of Flint, 467 Mich 1, 44; 651 NW2d 356 (2002).**

B. EXPERT TESTIMONY MAY BE NECESSARY TO ESTABLISH A PHYSICIAN'S DUTY TO AVOID INJURY WHILE PERFORMING AN IME. HOWEVER, EXPERT TESTIMONY SHOULD NOT BE NECESSARY IN THE CASE AT BAR.

The Court of Appeals specifically addressed this issue.

> We recognize that a determination of negligence might require testimony regarding what a reasonable physician would have done during the IME here. However, that testimony would not transform this case into a malpractice action in contravention of **Rogers, supra**. The question would still be whether defendant negligently caused Plaintiff physical harm, in violation of the limited duty attendant an IME. **Court of Appeals Opinion at 4, Fn6.**

The Plaintiff agrees with this formulation.

However, in the case at bar there may be no need for expert testimony. For example, Dr. Trachtman admitted that he was informed about the restriction. He testified that he routinely honored all medical restrictions imposed on an examinee. Further, he denied rotating the arm and testified that there was no reason to rotate the arm given the recent surgery.

In the final analysis, Plaintiff's negligence claim is based on common sense. In other words, one does not have to be a doctor to figure out that full rotation of an arm shortly after rotator cuff surgery is dangerous.

C. THE ALLEGATIONS AGAINST DR. TRACHTMAN ARE NOT BASED ON PROFESSIONAL NEGLIGENCE

Dr. Trachtman should be free to perform his duties. He was hired by a third party to perform an independent medical examination of the Plaintiff. He was not hired to treat the Plaintiff or provide him with a diagnosis. He was hired to provide opinions to a third party.

Stated differently, there was no patient-physician relationship. Consequently, he is immune from a civil lawsuit attacking his diagnosis, conclusions, opinions or professional judgment. **Sexton v Petz, 170 Mich App 561; 428 NW2d 715 (1988).**

On the other hand, common sense and reason suggest that an examinee should not be injured during an IME. An examinee should not be poisoned, overexposed to x-rays or otherwise injured during the IME.

The standard of care for Dr. Trachtman is that he should use reasonable care to avoid an injury to the examinee. This is not a medical malpractice standard. This is an ordinary negligence standard.

There is some difficulty with labeling this cause of action a claim for medical malpractice. It is, of course, settled law in Michigan that an IME does not create a patient-

physician relationship. Therefore, without a physician-patient relationship, there is no logical method to establish a duty based on professional standards.

The duty not to injure is different that a duty to examine a patient carefully and diagnose properly. It may be that an expert IME physician may have to establish the standard of care for the duty not to injure. However, the entry of an IME physician (as an expert for Plaintiff) will not change the case to medical malpractice. The medical expert's testimony will be about the proper conduct of an IME.

CONCLUSION

There is no logical reason to grant immunity to an IME physician who engages in inappropriate conduct and injures an examinee during the course of the examination.

The IME physician will remain immune from professional negligence claims. Consequently, the opinions of the IME physician are not subject to suit. The judgment of the IME physician is not subject to suit. Nevertheless, an IME physician may not rough up an examinee during the course of the examination and cause a discrete injury.

RELIEF REQUESTED

Plaintiff-Appellee, Marquis Dyer, respectfully requests that this court affirm the decision of the Court of Appeals and remand this case to the trial court for trial.

Respectfully submitted,

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